

TO: U.S. Department of State
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Adoption Regulations Docket Room, 3A-29
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Washington, DC 20520

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FROM: National Center for Adoption Law & Policy
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BUREAU OF
CONSULAR AFFAIRS

RE: Comments on State Department Regulations on Intercountry
Adoption
State/AR-01/86

Introduction

As an organization dedicated to child welfare, and specifically to promoting policies and practices that will help ensure the expeditious placement of children who need families into safe and healthy permanent homes, wherever those homes are located, the National Center for Adoption Law and Policy welcomes the opportunity to offer comments on the Department of State's proposed regulations to implement the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption and the Intercountry Adoption Act of 2000 ("IAA").

NCALP believes that the proposed regulations reflect the sincerity of the State Department's efforts to respond to the numerous and sometimes conflicting concerns that have been expressed by various segments of the adoption community throughout the rule-making process. The rules, in our view, go far toward achieving the goal of ensuring that the best interests of children are served through a uniform and transparent process that also respects agency concerns about financial resources and governmental oversight. There are, however, some provisions that we believe should be reassessed, and we respectfully offer the following comments for the Department's consideration as it finalizes the regulations.

Absence of Requirements Relating to Birth Parents

While the overriding policy behind these regulations is to prevent abuses against, and to protect the rights, of all members of the adoption triad -- children, birth parents, and prospective adoptive parents -- few provisions specifically address the rights of, and requirements in relation to, birth parents. Significantly, one such provision was eliminated in the State Department's revision of the Acton-Burnell draft regulations. The previous draft required the agency or person to provide proof to the U.S. state court with jurisdiction over the adoption that the birth mother's consent was executed after the child's birth. The revised regulations do not contain this provision.

The rights of birth parents and requirements relating to their participation in the adoption process, particularly in relation to standards for informed consent, should be clearly delineated. Otherwise, adoptive parents, agencies, and the government (to the extent permitted by principles of sovereign immunity), will be vulnerable to an increased risk of litigation.

based on such claims as adoption fraud and duress. In light of the recent events in the Marshall Islands involving numerous claims of fraud and deception by birth mothers who did not understand the consequences of their adoption consents, the Department, and the adoption community as a whole, have an interest in preserving the rights of birth parents by protecting them, to the fullest extent possible, against fraud and coercion.

While the proposed regulations may be intended to deter such unlawful behavior, a lack of specific guidance on these issues, which may result from a concern that attempts by the US to regulate other countries' internal adoption policies and procedures may be viewed as intrusive, leaves open the potential for uncertainty and abuse. An increased focus on the specific rights of birth parents would go far in extinguishing any doubts about what our government expects of agencies or persons, both foreign and domestic, in relation to dealings with birth parents in intercountry adoptions.

Universal Application of Standards

The findings prefacing the proposed regulations reflect Congress' recognition of the importance of uniformity in establishing standards for intercountry adoption. The definitions in section 96.2, and language of other sections of the proposed regulations, however, clearly limit the application of the regulations to Convention countries, at least for the present. The proposed regulations set excellent standards that we believe should apply to adoptions from all countries regardless of Convention country status. In the best interests of all children, we strongly encourage the Department to exercise its authority to ensure the applicability of the vital safeguards and high standards embodied in the proposed regulations to convention and non-convention countries alike.

Standards Applicable to Emigrating Children

Sections 96.53-.56

While we recognize that not all countries may have set standards as high as those embodied in these regulations for their agencies and persons, it is important to protect children emigrating to other countries to the fullest extent possible. The proposed regulations, however, reflect many discrepancies between standards for children immigrating as opposed to those applicable to emigrating children.

Specifically, we believe that standards regarding medical records for emigrating children should not be lower than those applicable to immigrating adoptees, and thus recommend that 96.54 require, consistent with 96.49 relating to immigrating children, that prospective adoptive parents be provided with a copy of the adoptive child's medical record prior to the adoption, along with contact information for the physician who performed the assessment.

Consistent with 96.47(a), we recommend that 96.34(f) be amended to include a requirement for agencies that facilitate adoptions of children in the United States to ensure that home studies on prospective adoptive parents include the solicitation of information on the adoptive parents' identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an

intercountry adoption, and the characteristics of the children for whom they are qualified to care.

Finally, we urge that 96.54 be revised to include a requirement for foreign adoption service providers to include in the adoption agreement a provision that ensures the adoption agency will be informed if the adoption is disrupted, and an agreement as to who will arrange and pay for the child to return to the US if the Secretary determines this is in the best interests of the child following a disrupted adoption.

Insurance Issues

Section 96.33(h)

Many adoption service providers are worried about their ability to comply with the requirement of 96.33(h) for liability insurance in a minimum amount of \$1,000,000 per occurrence. Many already report increasing problems with renewing their existing liability policies. We join in their fear that this rule, in concert with the provisions discussed below that impose all liability risks on primary providers and appear to prohibit any allocation of such risks among the primary providers, supervised providers, and adopting parents, will render many qualified adoption service providers unable to continue to provide services.

We therefore suggest that these rules be reassessed and that the Department take into account current adoption liability insurance market conditions in formulating requirements aimed to ensure against a more realistic level of risk. We also urge that the Department, with the cooperation and input of adoption service providers, use its resources and influence with the insurance industry to develop solutions that will enable service providers to comply with liability insurance requirements.

Allocation of Risk

Section 96.39 Information Disclosure and Quality Control Practices

Section 96.39(d) of the proposed regulations provides that an agency or person may not require a client or prospective client to sign a blanket waiver of liability in connection with the provision of services in Convention adoption cases. While we agree that the protection of adoptive parents from fraudulent practices is of paramount importance, we believe that balance must be built into the protective framework in order to safeguard an agency from assuming all liability for an adoption that fails due to circumstances over which the agency has little or no control.

The most troubling aspect of this provision is the lack of any definition of "blanket waiver" or guidance on whether the Department would consider the use of limited waivers based on clients' informed consent acceptable. We therefore propose that the language of this provision be modified to permit the agency or person to require a client to waive specific liabilities in connection with the provision of adoption services in Convention cases, provided that the agency or person provides a clear written description of the nature of the specific liabilities waived and the multiple risks of intercountry adoption, and the client, in writing, acknowledges these risks and voluntarily assumes them as a condition of receiving the adoption services. We further suggest that the Department provide, in the

regulations, approved language to be included in such voluntary, informed risk waivers and/or provide a standard form for that purpose.

Section 96.45 Using supervised providers in the United States

Section 96.46 Using supervised providers in other Convention countries

These provisions require agency primary providers to assume tort, contract and civil liability for their supervised providers' provision of contracted services to prospective adoptive parents, to assure their supervised providers' compliance with applicable regulatory standards, and to maintain a bond, escrow account, or liability insurance in an amount sufficient to cover liability risks arising from work performed by their supervised providers.

As noted above, many adoption service providers believe that regulations such as these will make it difficult or impossible to obtain required liability insurance for services provided in many of the countries in which they currently operate, or in the United States. The fear is that the effect of regulations that allocate liability solely to the primary providers with no assumption of risk by the consumer, while at the same time requiring high levels of insurance coverage, will be to reduce the number of providers able to meet the requirements and, ultimately, reduce the number of intercountry adoptions. In addition, coupling a strict liability type of standard for providers with high minimum per occurrence insurance coverage requirement will likely encourage litigation stemming from failed adoptions.

We join many members of the adoption community in proposing alternatives that will more fairly allocate the risks inherent in the intercountry adoption process and that will impose more realistic liability insurance coverage requirements.

These alternatives include: adding provisions that would allow exemption from the liability coverage and risk assumption requirements for providers who can demonstrate their own compliance with specified standards for due diligence in the selection and oversight of their supervised providers, if the supervised providers have good performance records and if informed adoptive parents sign waivers for specific risks associated with supervised providers; permitting informed, voluntary waivers of specified liabilities; requiring mandatory arbitration of claims against primary service providers by adoptive parents and capping awards available in such cases; and/or allowing for some allocation of risk among service providers, both primary and supervised.

Complaint Mechanisms

96.69 Filing of complaints against accredited agencies and approved persons

We endorse the creation of a complaint process that allows for complaints by adoption service recipients to the service providers, and a complaint registry for direct submission of complaints to the Department by federal and other public agencies, law enforcement agencies and foreign central authorities. We urge, however, that the complaint mechanism be expanded to allow for complaints by others, such as health care providers, who may be in a unique position to detect undesirable patterns of practice that are not obvious to the adoptive parents or other entities permitted to complain. In the interest of ensuring optimal provider practices, we believe the complaint procedure should be open to all interested parties, with appropriate safeguards set up to screen frivolous, unfounded or malicious complaints.

Conclusion

The National Center for Adoption Law & Policy applauds the Department's efforts in formulating proposed regulations that take into account the varying interests of and offer substantial protections to all members of the adoption triad. We urge the Department to consider our suggestions for revisions and additions, all of which we believe have the endorsement of a large segment of the adoption community. We would be pleased to offer assistance and additional input to the Department as the regulations are finalized.

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